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Supreme Court, U.S.
FILED
MAY 27 1998
OFFICE OF THE CLERK

No. 97-7213

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SYLVESTER MOSLEY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime . . . [f]oster the integrity, independence and expertise of the criminal defense profession . . . and [p]romote the proper and fair administration of justice". NACDL has almost 10,000 members nationwide – along with 80 state and local affiliate organizations representing another 28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court

on many occasions as *amicus curiae*. See e.g., Trest v. Cain, 66 U.S.L.W. 4023 (1997).[1]

SUMMARY OF THE ARGUMENT

The National Association of Criminal Defense Lawyers ("NACDL") files this *amicus* petition on behalf of Petitioner, Sylvester Mosley. At issue is whether the crime of larceny is a lesser included offense of the crime of robbery. The Third Circuit determined that larceny was not an included offense of the crime of robbery, and in so ruling, stands in the stark minority of the many courts addressing this issue. If the ruling is permitted to stand, the outcome of a defendant's case may well rise and fall on the accident of geography. If the indictment is filed virtually anywhere else in the United States, the jury would be instructed that larceny is a lesser-included offense of robbery. If the indictment is filed in the Third Circuit, the jury will be instructed only the offense of robbery. Defendants in the Third Circuit may thus

[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

have convicted of, if properly instructed, would be far less severe.

Because of the Third Circuit's anomalous ruling, making the geographical venue of the indictment the determinative factor in deciding what jury charge a defendant is entitled to receive, defendants in the Third Circuit are being singled out for excessive punitive treatment under a federal criminal statute that is supposed to be interpreted uniformly. The accused's constitutional rights to due process (including the right to the uniform application of the laws) and to a fair and impartial jury trial are plainly violated by the Third Circuit's decision. Beyond the effect of the decision on the Fifth and Sixth Amendment rights of the accused, however, the Third Circuit has ignored the continued vitality of fundamental rules of statutory construction established by this Court. In particular, this Court has repeatedly emphasized the importance of common law history to the interpretation of federal statutes predicated on common law crimes.

ARGUMENT

The United States Court of Appeals for the Third Circuit has ignored fundamental rules of statutory interpretation pronounced by this Court in disregarding the importance of common law history on the meaning of the crimes of bank robbery and bank larceny.

This Court has a lengthy tradition of recognizing that "a statutory term is generally presumed to have its common-law meaning." Taylor v. United States, 495 U.S. 575, 592 (1990). In enacting criminal statutes, Congress regularly legislates with a mind towards the historical and plain meaning of such offenses as embodied in Anglo-Saxon common law. United States v. Bailey, 444 U.S. 394, 415, n.11 (1980).

In recognizing the above guiding principles of statutory construction and interpretation, because common law background will routinely accompany any evaluation, Congress must express a specific and clear intent when deviating from a recognized common-law meaning. As announced in Nationwide Insurance Co. v. Darden, 503 U.S. 318, 322 (1992), (quoting Community for Creative Non-violence v. Reid, 490 U.S. 730, 739 (1989):

> We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those "terms ... have accumulated settled meaning under ... the common law" and "the statute does not otherwise dictate."

See also United States v. Wells, No. 95-1228, 1997 U.S. LEXIS 1452, p. 18-19 (1997); United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250, 251-252 (1922). In accordance with this rule of construction, the

Court directed in United States v. Turley, 352 U.S. 407, 411 (1957), "[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."

In evaluating the Third Circuit's differentiation between the crimes of bank robbery and bank larceny in the instant matter, it is glaringly apparent that the Court of Appeals neglected to apply the above rule of statutory construction regarding common-law deference when conducting its interpretation. In ruling that the bank robbery offense provided in 18 U.S.C. §2113(a) does not implicitly include the element of an "intent to steal," the Third Circuit has effectively rejected the historical and common-law meanings of both robbery and larceny. United States v. Mosley, 126 F.3d 200, 204 (3d Cir. 1997).

Historically, larceny and related theft crimes are among the oldest crimes recognized and charged.[2] "Stealing,

[2] Remarkably, theft crimes were amongst the first offenses recognized and punished throughout history. "Thou shalt not steal." Bible, Authorized Version, Exodus, 20:15. There shall "be no robbry." John Heywood, Proverbs, pt. I, ch.IV (1546). The crimes of stealing and larceny are invasions of rights of property, which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is

larceny and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation." 2 Russell on Crime 1037 (10th ed., Turner, 1950). And traditionally, robbery was always considered an aggravated form of larceny at common law.[3]

In the seminal case, Morissette v. United States, 342 U.S. 246 (1952), defendant's theft conviction under 18 U.S.C. § 641 was reversed by this Court. The Court of Appeals had held that the failure of Congress to include an element of criminal intent in adopting the statute was evidence that Congress intended to make theft under the statute a strict liability crime. Id. at 250. Acknowledging that state courts of last resort have consistently retained the well-grounded, common-law requirement of intent in larceny-type offenses, this Court aptly noted:

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that of a felony. 2 Pollock and Maitland 465, History of English Law (2d ed. 1899).

[3] Larceny and robbery "are intimately connected, the one being included in the other" but robbery is "an aggravated larceny" and "the felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East's Pleas of the Crown, ch. 16, §§1, 124 (1803 ed.). Robbery is a kind of "mixt or complicated larceny, ... a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear." 1 Hawkin's Pleas of the Crown, ch. 34, §§1,3 (1716 ed.). Robbery is "an aggravated species of larceny." 2 Russell on Crimes, 101 (4th ed. 1865).

> Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

Id. at 262.

Consequently, this Court held:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Id. at 263.

Accordingly, the Morisette Court reversed the Court of Appeals' decision and attributed an intent element to the crime of larceny after a painstakingly thorough evaluation of

of the offense's common law history.[4] And, the intent element that was enunciated was defined as follows:

> ... [T]he removal of [the property] was a conscious and intentional act .... But that isolated fact is not an adequate basis on which the jury should find **the criminal intent to steal or knowingly covert, that is, wrongfully to deprive another person of property**. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

Id. at 276. (Emphasis supplied).

In summary, the intent necessary for any crime of larceny is "wrongfully to deprive another person of property." When evaluating the statute in question for the crime of bank robbery, it reads, " Whoever, by force or intimidation, takes, or attempts to take, from the person or presence of another, ... any property or money or any other thing of value belonging to ... any bank ...." 18 U.S.C. §2113(a). Therefore, the intent element, for robbery of a bank. is necessarily the same as the intent for larceny, and the

[4] "That felonious taking away of property which may be the subject of the offense constitutes the common law offense of larceny cannot be disputed ...." Morrissette, supra, 342 U.S. at

characteristic is the use of "force or intimidation." Thus, the only element that distinguishes bank robbery from bank larceny is the added element and existence of force and intimidation necessary for bank robbery, if due deference is given to the common-law meaning of the crimes.

Moreover, in contravention of criminal defendants' constitutional rights to due process, to a fair and impartial jury and to even application of the law, defendants indicted in the United States Court of Appeals for the Third Circuit are being singled out for excessive punitive treatment under a federal criminal statute that must be interpreted uniformly.[5]

Almost every federal circuit that has considered the issue has held that the crime of bank larceny prohibited by 18 U.S.C. Sec. 2113(b) is a lesser included offense of the crime of bank robbery prohibited by 18 U.S.C. Sec. 2113(a), and has therefore held that a criminal defendant charged with

U.S. at 266, n.28 (quoting Crabb v. Zerbst, 99 F.2d 562, 564-565 (5th Cir.1938)).

[5] There is a federal interest in uniformity and a constitutional due process interest in having firmly defined and easily applied rules. Indeed, in enacting the Federal Rules Congress' central goal was uniformity in the federal courts. See Hanna v. Plummer, 380 U.S. 460, 472 (1965); Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Griffith v. Kentucky, 479 U.S. 314 (1987) (principles of equality require that similarly situated litigants should be treated the same).

of bank robbery prohibited by 18 U.S.C. Sec. 2113(a), and has therefore held that a criminal defendant charged with robbery is entitled to a jury instruction on the lesser included offense of larceny.

The Fourth Circuit in United States v. Carter, 540 F.2d. 753 (4th Cir. 1976), reversed the defendant's conviction holding that since bank larceny is a lesser included offense of bank robbery, it was constitutional error for the district court to fail to instruct the jury on the lesser included offense. This is because, as the Fourth Circuit noted, "Larceny, in fact, is generally regarded as a necessarily included offense in the crime of robbery . . . It is impossible to commit robbery without having first committed larceny". Id. at 754 (citing 8A Moore's Federal Practice para. 31.03[2]; 2 Wright Federal Practice and Procedure Sec. 515). See also United States v. Amos, 566 F.2d 899 (4th Cir. 1977) (holding that a conviction for bank larceny merges into a conviction for the greater offense of bank robbery).

The First Circuit in United States v. Henson, 945 F.2d 430, 440 (1st Cir. 1991) concluded that the principal difference between bank robbery under 18 U.S.C. Sec. 2113(a), and bank larceny, under 18 U.S.C. Sec. 2113(b), is that bank larceny does not include the elements of "force and violence or . . . intimidation". Id. at 440. Consequently, a criminal defendant is entitled to an instruction on the lesser

permit a rational jury to find guilt under the lesser charge and to acquit on the charge alleged. Id.

The Sixth Circuit in United States v. Perry, 991 F.2d 304, 307 (6th Cir. 1993), rejected defendant's argument that he was entitled to a jury instruction on the lesser included offense of bank larceny solely because such charge was not supported by the evidence in the record. Although the court did not reach the issue raised by defendant, that bank larceny is a lesser included offense of bank robbery, the court noted, "there is no evidence in the record to support a finding that *the lesser included offense of bank larceny*, which lacks the element of force and violence or intimidation, was committed *while the greater offense of bank robbery* was not," thereby giving some insight on how the court would rule should the issue at some point be presented. Id. at 311 (emphasis supplied).

The Eighth Circuit in United States v. Cady, 495 F.2d 742, 748 (8th Cir. 1974), similarly held that the only difference between bank larceny and bank robbery is that the taking in bank robbery must be by force violence or intimidation. See also United States v. Flint, 534 F.2d 58, 60 (5th Cir. 1976) (noting that the crime of bank robbery requires "the additional element [of] taking "by force or violence, or by intimidation").

In United States v. Sandles, 80 F.3d 1145 (7th Cir. 1996), the court found that as an element of the crime of bank robbery, the government must prove that the accused committed the crime by force and violence, or by intimidation. This element is missing from the lesser included crime of bank larceny under 18 U.S.C. Sec. 2113(b). Id. at 1147, n.1. See also United States v. Cornillie, 92 F.3d. 1108, 1109 (11th Cir. 1996) (bank larceny only lacks the essential element of force or intimidation to be a robbery); United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) (holding that larceny is a lesser included offense of bank robbery).

Finally, in Walker v. United States, 418 F.2d 1116 (D.C. Cir. 1969) the District Court for the District of Columbia declared that "it is beyond dispute that larceny is a necessarily included offense of the crime of robbery" under the District of Columbia Criminal Code. Id. at 1120.

Indeed, only the Ninth Circuit has concluded that larceny is not a lesser included offense of robbery. See United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) (holding that larceny contains a specific intent element not required for a bank robbery conviction).

It is respectfully submitted that the Ninth Circuit in Gregory and the Third Circuit below erred in applying the principles enunciated by this court in Schmuck v. United

States, 489 U.S. 705 (1989). There, this Court established the "elements test" to determine whether one offense is necessarily included in another, thereby entitling a criminal defendant to have the jury instructed on a lesser included offense of the crime charged pursuant to Federal Rule of Criminal Procedure 31(c). Under the elements test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser crime must form a subset of those of the charged offense in order for the lesser offense to be included in the greater one. The comparison "is appropriately conducted by reference to the statutory elements of the offenses in question." Id. at 718. The comparison must be textual. Id. at 720.

In holding that the crime of bank larceny is not a lesser included offense of the crime of bank robbery, the Third Circuit below concluded that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent" to steal, while this element of intent is required for a conviction under subsection (b). In engaging in this analysis, the Third Circuit framed the issue as whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). The Third Circuit's conclusion that the bank robbery statute does not include an intent element and that the subjective intent of a bank robber to steal is irrelevant, entirely ignores

this Court's jurisprudence regarding the presumptive implied intent element in federal criminal statutes.

The Third Circuit's decision has in effect made bank robbery under subsection (a) a strict liability crime. Strict liability for criminal offenses, however, runs afoul of a criminal defendant's constitutional due process rights and this Court's long history of interpreting criminal statutes to include applicable scienter requirements, even where the statute by its terms does not contain them. United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994); Staples v. United States, 511 U.S. 600 (1994) (emphasizing that the requirement of *mens rea* for a crime is firmly embedded in the common law).

Indeed, as this Court related in Morissette, general principles of liability require that a criminal defendant must have the requisite mens rea before he can be convicted of a crime:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as unequivocal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250.

Supra, 342 U.S. at 250.

Indeed, this is consistent with the Model Penal Code policy that "knowing" behavior is required by offenses which are defined without a specified mental state element. Cf. Morissette, 342 U.S. at 252 ("As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.")

Moreover, it is difficult to ascertain how an intent requirement is not implied in bank robbery which requires taking money or any other thing of value by force and violence or intimidation from the person or presence of another. 18 U.S.C Sec. 2113(a). Therefore, as most of the circuits which have considered the issue have concluded: robbery is in effect larceny with the additional element of force or intimidation.

Conclusion

For all the foregoing reasons, the Third Circuit's ruling must be reversed.

Respectfully submitted,

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